Supreme Court of the United States.
Pam HEIN, State's Attorney of Charles Mix County; Keith Mushitz, Member of the Charles Mix County, South Dakota, County Commission; Neil Voneschen, Member of the Charles Mix County, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix County, South Dakota, County Commission, Petitioners,
v.
YANKTON SIOUX TRIBE and United States of America, Respondents.
No. 10-932.
January 18, 2011.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether Congress disestablished the Yankton Sioux Reservation in the Act of 1894, 28 Stat. 286, as the South Dakota Supreme Court held in *Bruguier v. Class,* 599 N.W. 2d 364 (S.D. 1999). In contrast, the court of appeals in the decision below ruled that the reservation had not been disestablished by that act of Congress.

***II** LIST OF PARTIES

The caption of the case contains the names of all the parties to the proceeding, except Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota; and Southern Missouri Waste Management District.

***iii** TABLE OF CONTENTS

***ix** TABLE OF AUTHORITIES

Cases:

***1** PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on May 6, 2010, insofar as the judgment and opinion find that the Yankton Sioux Reservation has not been disestablished.

OPINIONS BELOW

The amended opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Podhradsky,* 606 F. 3d 994 (8th Cir. 2010) and is reprinted in Appendix I (App. I) at 1-51. The Eighth Circuit issued an Order on Petitions for Rehearing, reported at *Yankton Sioux Tribe v. Podhradsky,* 606 F. 3d 985 (8th Cir. 2010) and reprinted at App. I, 52-70. The opinion of the Eighth Circuit which was later amended is reported at *Yankton Sioux Tribe v. Podhradsky,* 577 F. 3d 951 (8th Cir. 2009) and is reprinted at App. I, 71-121. The Memorandum Opinion and Order of the District Court for the District of South Dakota is reported at *Yankton Sioux Tribe v. Podhradsky,* 529 F. Supp.2d 1040 (D.S.D. 2007) and is reprinted at App. I, 122-163. The earlier opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Gaffey,* 188 F. 3d 1010 (8th Cir. 1999) and is reprinted at App. I, 199-249. The Memorandum Opinion and Order of the District Court for the District of ***2**South Dakota is reported at *Yankton Sioux Tribe v. Gaffey,* 14 F. Supp.2d 1135 (D.S.D.

1998) and is reprinted at App. I, 250-320.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit was entered on May 6, 2010. The Eighth Circuit denied timely petitions for rehearing and suggestions for rehearing en banc on September 20, 2010. App. I, 364-365. The Honorable Samuel Alito, Associate Justice, on December 14, 2010, extended the time for the filing of Petitions for Writ of Certiorari to January 18, 2011. App. I, 366. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) is reprinted at App. I, 367-379.

The Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted at App. I, 380-394.

SUMMARY

[T]he United States, because of its special relationship with the Indian Tribes, has a ***3** strong interest in protecting the integrity of reservation boundaries.

Br. for the United States Supp'g Respt's at 1, *South Dakota v. Yankton Sioux Tribe,* (No. 96-1581).

This case can be summarized in a few paragraphs. It does not come to this Court on a clean slate. In *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998), this Court decided unanimously to reverse the court of appeals, commenting on the "absurd" results of resurrecting reservation boundaries deemed disestablished for almost a century in a number of other decisions from the South Dakota Supreme Court. App. I, 321. In his dissent, Judge Magill perceived an almost "single-minded desire to avoid diminishment at all costs." *Yankton Sioux Tribe v. Southern Missouri,* 99 F. 3d 1439, 1462 (1996) (Magill, Frank J., dissenting).[FN1] Nothing has changed in this regard.

FN1. Judge Magill retired in 2007.

Following the lead of the United States, the district court and the court of appeals fashioned a series of disconnected "Yankton Reservations" out of whole cloth, in a decision that squarely conflicts with a century of state and federal precedent, including the latest decision of the South Dakota Supreme Court in *Bruguier v. Class,* 199 S.D. 122, 599 N.W. 2d 364 (S.D. 1999), discussed below at 28-33.

In this Court in *Yankton Sioux Tribe*, the County tracked the role that the shifting arguments of the ***4** United States have played in reservation status litigation in this Court starting in 1962. Br. of Charles Mix County, App. II, 460-503. The arguments of the United States supporting the resurrection of reservation boundaries have been squarely rejected by this Court in every case since 1973, except one. The County has appended the briefs of the United States and the transcripts of oral arguments of the United States in each reservation status case decided by this Court, including *Yankton Sioux Tribe*, to show the shifting sands from which the United States argues. App. II, 808-859. The arguments of the United States are discussed *infra* at 35.

The decision of *Bruguier*, decided after *Yankton Sioux Tribe*, is the most recent South Dakota case on point. The court of appeals' and *Bruguier*'s direct conflict is addressed *infra* at 16-33.

1. This Court would have authoritatively resolved the status of the Yankton Reservation in *Yankton Sioux Tribe*, but for one reason. Simply stated, this Court was misled by the United States and the Tribe with reference to the question of whether the Tribe had ceded all of the unallotted lands or retained some of the tribal lands in common. The transcript for oral argument demonstrates the significance of the misrepresentation on this crucial point.
Court: What other tribal lands? I mean, that's crucial to me, ! thought all the tribal lands, all the com-

munally owned lands were given to the United States. That's - that's certainly what this -
***5** Tribe: No. No.
Court: No?

Transcript of Oral Argument, *Yankton Sioux Tribe*, 522 U.S. 329 (1998) (emphasis added), App. II, 845. As a result, this Court remanded the case for a decision on this point (whether the Reservation was entirely disestablished).

After the remand, the district court was reversed again by the court of appeals in *Yankton Sioux Tribe v. Gaffey,* 188 F. 3d 1010 (8th Cir. 1999), for continuing to recognize the original 1858 reservation boundaries that this Court in *Yankton Sioux Tribe* held were disstablished. In the process, the district court and the court of appeals recognized that the cession did not reserve any land in common for the Tribe (contrary to the express statements of the United States and the Yankton Sioux Tribe in oral argument in this Court). *Yankton Sioux Tribe* was a complete cession, identical in every significant respect with the cession in *DeCoteau v. District County Court,* 420 U.S. 425 (1975).

The *Gaffey* panel, however, avoided the disestablishment conclusion in this case by, *without briefing*, taking one sentence in the *Yankton Sioux Tribe* opinion out of context. That sentence involved *ceded* agency lands. In *Yankton Sioux Tribe*, this Court cited the agency provision as a somewhat contradictory provision that counseled against finding reservation termination in the context of the State's and the Tribe's conflicting positions regarding the status of the original 1858 reservation boundaries. And, the Court quoted the reliance in *Solem v. Bartlett* on a ***6** similar agency provision in support of the continued existence of original reservation boundaries around the area in *Solem*.

2. Even the United States acknowledged that the court of appeals did not explain the agency decision. In *Yankton Sioux Tribe*, the agency provision was not persuasive in terms of preserving the *original* reservation boundaries. In *Solem*, the original reservation boundaries were deemed to be preserved for a number of reasons. *Significantly, in neither case was the agency provision probative of establishing 18 USC §1151(a) reservation boundaries around each noncontiguous tract of agency land ceded pursuant to this provision* (or any other trust land for that matter).

In context, this provision is not "strong evidence" of preserving an 18 USC §1151(a) agency reservation, as the court of appeals incorrectly held (approximately 1,000 acres of noncontiguous 18 USC §1151(a) reservation). (Especially in light of the fact that the United States earlier acknowledged that reservation boundaries were not even addressed during negotiations.) Br. of the United States at 3; *Yankton Sioux Tribe v. Southern Missouri,* 99 F. 3d 1439 (8th Cir. 1996) (J. Magill dissenting). At the time, the Yankton Sioux Tribe told this Court that the holding conflicted with every United States Supreme Court opinion.

***7** Seizing upon this misapplication of one sentence in *Yankton Sioux Tribe* by the *Gaffey* panel, the United States convinced the district court to recognize extensive 18 USC §1151(a) noncontiguous reservation boundaries. They are around every single tract of trust land in the entire original reservation area (at least 37,000 acres and maybe another 6,000 acres or another 230,000 acres of fee lands), including all individual allotments, contrary to all state and federal precedent. Early on, the attorney for the Yankton Sioux Tribe predicted that "drawing a boundary around each parcel of trust land … would result in an *absurdity*, and realistically cannot be done." Plaintiff's Response Brief to State and County Brief on Status of Reservation Lands and Existence of Boundaries (October 24, 2007) (emphasis added). Nevertheless, that was the decision of the district court.

The court of appeals affirmed the district court with apparently the same single-minded desire to support any reservation boundary noted in the dissent to the court of appeals' initial decision. *In this instance, however, neither the United States nor the*

Yankton Sioux Tribe ever claimed a Yankton Reservation with this configuration.

In the process, the district court and the court of appeals continued to ignore nearly a century of state and federal precedent, disregarding the fact that in *Yankton Sioux Tribe* this Court expressly noted the significance of the decisions of the South Dakota ***8** Supreme Court in this case ("we granted certiorari to resolve a conflict between the decision of the court of appeals and a number of decisions of the South Dakota Supreme Court …") and cited the state decisions with approval, *Yankton Sioux Tribe* at App. 342. Petitioners regret that it is necessary to even request this Court to take some action in this case again.[FN2]

> FN2. In this light, the Counties agree that something less than plenary attention may be appropriate in this instance, including summary consideration in conformity with *Bruguier. See* Pet. for Writ of Cert. filed by the State of South Dakota concurrently with this Petition, 38 n.9.

In the end, the court of appeals did reference the South Dakota Supreme Court in a two-sentence footnote that summarily dismissed *Bruguier*, as simply "more sweeping than necessary."

Initially, the United States and the Tribe both recognized that *Bruguier* did conclude that the Reservation was "wholly disestablished," as they told this Court at the time in Applications for an Extension of Time, 5 n.1, *United States v. Yankton Sioux Tribe*; 4 n.1, *Yankton Sioux Tribe v. Gaffey; South Dakota v. Yankton Sioux Tribe, Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683). Of course, that concession will not be repeated this time. Rather, we now expect the United States and the Tribe to continue to submit arguments to undermine *Bruguier*, in order to minimize a conflict that would otherwise be worthy of the attention of this Court.

In short, following the lead of the United States, the district court and the court of appeals repeatedly ***9** failed to give proper weight to the "very strong presumption," "nearly irrebuttable," "an almost irrebuttable presumption" of diminishment/disestablishment, that would take "a whole lot - not something … ambiguous" to refute, that should have been controlling this case. Transcript of Oral Argument, *Yankton Sioux Tribe,* 522 U.S. 329 (1998), App. II, 841-842. *See also Yankton Sioux Tribe,* 522 U.S. 329, 344 (1998), App. I, 343. In addition to supporting the arguments in the State Petition, the County respectfully submits that this Court should focus on this fundamental error.

3. Judge Magill noted throughout his dissent in the first court of appeals decision that the presumption of disestablishment should have been controlling in this case from the beginning. The decision of this Court in *Yankton Sioux Tribe* generally confirms the position of Judge Magill.

From these arguments one senses an underlying effort to achieve a result more in harmony with "modern sensibilities" and "a single-minded desire to avoid diminishment at all costs." As a result, once again, as Judge Magill noted in his powerful dissent, the court of appeals has "never acknowledged that the presumption exists." *Id.* at 1459. The fashioning of an unprecedented 37,000 acre noncontiguous reservation under 18 USC §1151(a) in this manner deserves the attention of this Court with reference to conflict it creates with the Supreme Court of South Dakota, especially *Bruguier*. In the process, this Court can assess whether the opinion in *Yankton Sioux Tribe* ***10** has been properly regarded and properly construed in the court of appeals. The miscarriage of justice in this case can be addressed because *Bruguier* adhered to *DeCoteau* and *Yankton Sioux Tribe*. The court of appeals did not.

STATEMENT OF THE CASE

A. *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 890 F. Supp. 878 (D.S.D. 1995); *Yankton Sioux Tribe v. Southern Missouri*

Waste Management District, 99 F.3d 1439 (8th Cir. 1996); and *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998), App. I, 321-364.

The dispute over the status of the Reservation commenced when the Yankton Sioux Tribe sued Southern Missouri Recycling and Waste Management District. Southern Missouri acquired property in fee for a municipal solid waste facility on land ceded by the 1894 Act. Southern Missouri sought a state permit for the landfill. After state courts rejected environmental challenges, the Yankton Sioux Tribe filed suit in federal district court. The Tribe sought to enjoin construction of the landfill.

Southern Missouri joined South Dakota as a third party to enable the State to defend its jurisdiction to issue the permit. The court declined to enjoin the landfill project, but ruled that the 1894 Act did not disestablish or diminish the Reservation. ***11** *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.,* 890 F. Supp. 878, 891 (D.S.D. 1995) . Not surprisingly, the United States, as *amicus curiae*, supported the Tribe's claim.

A divided panel of the court of appeals affirmed, relying principally (as had the district court) upon the "saving clause" in the 1894 Act. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.,* 99 F. 3d 1439, 1447-1448 (8th Cir. 1996). The United States again supported the argument of the Tribe. This Court granted certiorari and unanimously reversed. *Yankton Sioux Tribe,* 522 U.S. 329, App. I, 321-364.

The Court based its decision primarily on the cession language of the 1894 statute. *DeCoteau v. District County Court,* 420 U.S. 425 (1975). In particular, the Court found that Articles I and II of the Agreement contained "'cession' and 'sum certain' language [which] is 'precisely suited' to terminating reservation status." *Id.* at 344. The Court cited *DeCoteau* as support for that presumption and continued:

The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau* … and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe.

Id. at 344 (citing 420 U.S. at 445).

The Court rejected the holding of the district court that the Article XVIII saving clause should be ***12** given decisive effect. *Yankton Sioux Tribe,* 522 U.S. at 348. It also rejected the arguments of the United States in support of the Tribe's position.

Earlier passages in the Court's opinion indicated that the Yankton Reservation was disestablished. In the end, however, the Court chose not to determine whether the Reservation was "disestablished … altogether." *Id.* at 358. Observing that it "need not determine" that issue to decide the case before it, the Court elected to "limit [its] holding to the narrow question presented." *Id.* The Court did so after noting "conflicting understandings about the status of the reservation" and alluding to the Tribe's ownership of "land in common." *Id.* The Court therefore reversed and remanded the case for further proceedings. *Id.*

B. *Yankton Sioux Tribe v. Gaffey,* 14 F. Supp.2d 1135 (D.S.D. 1998), App. I, 250-320, and *Yankton Sioux Tribe v. Galley,* 188 F.3d 1010 (8th Cir. 1999), App. I, 199-249, cert. denied, 530 U.S. 1261 (2000).

1. On remand, the Tribe's initial action was consolidated with a declaratory judgment action brought by the Tribe to challenge state criminal jurisdiction over tribal members on all allotted land within the 1858 reservation boundaries. The United States joined as a *party* supporting the Tribe. After an evidentiary hearing, the district court held that the original boundaries of the Reservation still remained intact. *Gaffey*, App. 318-320. Further, the district court found ***13** that all lands within those original boundaries that were not ceded in the 1894 Act, i.e., all allotted lands, and other trust land also remained part of the Reservation (*Gaffey*, App. 318-319), even though roughly 90 percent of the al-

lotted lands had been transferred to non-Indians (230,000 acres). *Yankton Sioux Tribe*, App. I, 336.

2. The court of appeals held that the boundaries of the 1858 reservation were not maintained, reversing the district court in part. *Gaffey*, App. 248. And, the court further held that allotted land which had left Indian ownership was no longer part of the Reservation or "Indian country" of any kind: "we hold that the [reservation] … has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey*, App. 247. The court of appeals also found that the Reservation had not been " disestablished," stating the "Reservation" consisted of certain former "agency lands" conveyed to the Tribe decades later, and potentially an unknown quantity of other "trust" land. *Gaffey,* App. 249.

The court of appeals left to the "district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust." *Id.* It directed the district court to initially determine which, if any, of the allotted lands then held in trust and other lands taken into trust under various statutes, including the Indian Reorganization Act ("IRA"), were "reservation" under 18 USC §1151 (a).

***14** C. *Yankton Sioux Tribe v. Podhradsky,* 529 F. Supp.2d 1040 (D.S.D. 2007), App. I, 122-163; *Yankton Sioux Tribe v. Podhradsky,* 577 F.3d 951 (8th Cir. 2009), App. I, 71-121; and *Yankton Sioux Tribe v. Podhradsky,* 606 F.3d 994 (8th Cir. 2010), App. I, 1-51.

On this remand, the district court determined that all land allotted to individual Indians before the 1894 Act, which still remained in allotted status, all land taken into trust under the Indian Reorganization Act, and the agency land conveyed to the tribe decades later by virtue of the Act of 1929 - was a "reservation" under 18 USC §1151(a). *Podhradsky,* App. 162-163.

The circuit court issued its first opinion and affirmed the district court, with a minor exception. App. 120-121. In essence, the court of appeals declared that agency lands, allotments which remained in allotted status, and IRA trust lands, have " reservation" status under 18 USC §1151(a). A small quantity of miscellaneous noncontiguous trust lands were alternatively found to constitute dependent Indian communities under 18 USC §1151(b). *Podhradsky*, App. 120. The portion of the district court opinion holding that fee land continuously held in Indian ownership was "reservation" was vacated in that there was no evidence of such lands. *Podhradsky*, App. 115-116, 120-121.

The court of appeals also found all Indian allotments *within the limits* of this isolated noncontiguous "reservation" as trust land allotments would come within the purview of the new definition of Indian ***15** country in 18 USC §1151(a), *even if the lands were subsequently owned in fee by non-Indians*. This holding was not part of the district court's opinion or even used by the Tribe or the United States. The panel, in essence, reached out to give the Tribe even more than it asked for.

Petitions for rehearing and rehearing en banc were filed by the State, the County and Southern Missouri. In response to the Petitions, the court of appeals stated in an Order on Petition for Rehearing that language relating to the allotted lands converted to fee lands after 1948 had not been "incorporated into our judgment." *Podhradsky*, App. 55. As a result, the court of appeals further stated that "footnote 10 and several textual asides" would be deleted to reduce potential misunderstanding. *Podhradsky*, App. 56. An Amended Opinion was issued. This Amended Opinion is the subject of this Petition. *Podhradsky*, App. 52-71.

Subsequent submissions by the State, accepted by the court of appeals, established approximately 6,000 acres of allotted lands that have, in fact, been taken out of allotted status since 1948; these lands are now owned in fee by non-Indians. *See* 2007 Ex. 210. All of this former allotted land is, presumably, permanent "reservation" owned in fee by non-

Indians within the ***16** isolated noncontiguous reservation boundaries fashioned by the court of appeals in *Podhradsky*.[FN3]

FN3. All of the lands on the map in a color darker than the background are thus "reservation" except for a few parcels of tribal lands held in "unrestricted fee" status and shown in blue-grey. App. I, 395.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Eighth Circuit Court Of Appeals Directly Conflicts With The Decision Of The South Dakota Supreme Court In *Bruguier v. Class,* 599 N.W.2d 364 (1999), App. I, 164-198.

This Court has used certiorari to resolve reservation status conflicts between state supreme courts and federal courts of appeals before:
We granted certiorari in the two cases, 417 U.S. 929, to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the Eighth Circuit as to the effect of the 1891 Act on South Dakota's civil and criminal jurisdiction over unallotted lands within the 1867 reservation boundaries.

DeCoteau v. District County Court, 420 U.S. 425, 431 (1975).
We granted certiorari, 507 U.S. 1028 (1993), to resolve the direct conflict between these ***17** decisions of the Tenth Circuit and the Utah Supreme Court. …

Hagen v. Utah, 510 U.S. 399, 409 (1994).
We granted certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court. …

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 342 (1998).

A. The decision of the court of appeals is clearly erroneous.

1. This case has been before the Eighth Circuit three times. The first time, adopting the argument of the United States, the district court and the court of appeals failed to give proper weight to the presumption of disestablishment. The district court resurrected the 1858 reservation boundaries (an area of 440,000 acres, 90% owned by non-members, with 2/3 of these non-members residing on small farms and in small towns and cities). *Yankton Sioux Tribe v. Southern Missouri,* 890 F. Supp. 878 (D.S.D. 1995). A divided panel of the court of appeals affirmed. *See Yankton Sioux Tribe v. Southern Missouri,* 99 F. 3d 1439 (8th Cir. 1996). This Court granted certiorari to resolve conflicts with the Supreme Court of South Dakota. This Court unanimously reversed the court of appeals. *Yankton Sioux Tribe,* 522 U.S. 329 (1998).

Yankton Sioux Tribe held that the 1858 reservation boundaries were extinguished by the 1894 Act, as ***18** the South Dakota Supreme Court had repeatedly recognized for almost a century. *Id.* at 342. This Court cited the decisions of the South Dakota Supreme Court with approval. *Id.* at 345.

2. The second time, again following the lead of the United States, the district court recognized the 1858 reservation boundaries, despite the opinion of this Court in *Yankton Sioux Tribe. Yankton Sioux Tribe*, App. 250. The court of appeals reversed the district court on this point and confirmed that *Yankton Sioux Tribe* had held that the 1858 boundaries were extinguished by the 1894 Act. However, the court of appeals, in derogation of the "very strong presumption" of diminishment/disestablishment (which the court of appeals utterly failed to mention, much less discuss), wrongly resurrected an 18 USC §1151(a) "reservation" of a few hundred acres of ceded noncontiguous agency lands, with 18 USC §1151(a) reservation boundaries around each tract.

The agency lands were unquestionably ceded by Article I to the United States in 1894 ("all unallotted lands" ceded), for eventual use by settlers "when no longer required" for agency purposes. The court of appeals simply ignored the cession. In-

stead, the court of appeals incorrectly found that the ceded agency lands were an 18 USC §1151(a) reservation by taking one sentence out of context in *Yankton Sioux Tribe* and then focusing on a 1929 Act that eventually allowed the transfer of these lands to the tribe, intermittently, in a series of conveyances decades later. The 1929 Act never mentioned reservation status for these lands.

***19** 3. The third time, the district court seized on the fact that the court of appeals had just recognized an agency 18 USC §1151(a) "reservation." *Yankton Sioux Tribe*, App. I, 122. With the encouragement of the United States, the district court took the unprecedented step of declaring all land remaining in trust, primarily isolated noncontiguous tracts, to constitute retroactively an 18 USC §1151(a) "reservation." Never before has 37,000 acres of isolated noncontiguous trust tracts, within *extinguished* reservation boundaries, been declared "within the limits" of a under 18 USC §1151(a).

Following the lead of the United States, the court of appeals again affirmed the district court. App. I, 71. In addition, incredibly, the court of appeals, on its own initiative, also incorrectly added another 6,000 acres of noncontiguous non-Indian fee land because of a misreading of the generic Indian Country statute, 18 USC §1151. (This statute never mentioned the Yankton reservation and was passed in 1948, more than a half century after the Yankton Act).

In the process, no one was given an opportunity to brief the 18 USC §1151(a) reservation status of this post 1948 fee land: not the State, not the County, not the United States, not the Tribe, and most importantly, not the landowners, whose lives and property are impacted ("within the limits" of a "reservation"), without *any* notice whatsoever. County's Petition for ***20** Rehearing and Petition for Rehearing En Banc at 6-12.

This unprecedented holding was the direct result of the district court and the court of appeals continuing to ignore the very strong presumption of diminishment/disestablishment in *Yankton Sioux Tribe*, and instead adopting the arguments of the United States. Moreover, the remand was expressly limited to trust land (as the Order on rehearing subsequently acknowledged ("trust land")). The Order on rehearing removed the post 1948 fee land language from the court of appeals opinion. However, the practical consequences of the Order remain especially troublesome.[FN4]

> FN4. This Court should review the post 1948 fee land issue for two reasons. As the State has pointed out, the Order deleting the post 1948 fee land footnote is just a short term fix. The generic rationale for including post 1948 fee lands with 18 USC §1151(a) reservation boundaries has not been completely withdrawn from the court of appeals opinion. As a result, the text of the court of appeals opinion will undoubtedly be used in future litigation to argue that post 1948 fee lands are within the limits of an 18 USC §1151(a) reservation. Moreover, if the United States repeats its other argument, all 230,000 acres of fee lands, owned primarily by non-Indians, will also be similarly situated. Brief for the United States in Opposition at 8-9, *South Dakota v. Yankton Sioux Tribe, Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683).

4. Another portion of the court of appeals opinion that deserves additional consideration by this Court includes the conflicting holdings in this case, as well as the recent conflict within this circuit. The Amended Opinion of the court of appeals recognizes reservation boundaries around all Indian allotments still held in trust. This decision of the court of appeals ***21** conflicts with allotment/fee holding in *Gaffey*, App. I, 199, and conflicts as well with *Yankton Sioux Tribe v. U.S. Army Corps of Engineers,* 606 F. 3d 895 (8th Cir. 2010), that expressly adopted this aspect of *Gaffey* as the holding in that case.

If the court of appeals is correct that all allotments

still held in trust are encompassed by 18 USC §1151(a) reservation boundaries, then *Gaffey* could not have been correct in holding that those same allotments that are now in fee are not within 18 USC §1151(a) reservation boundaries. In other words, 18 USC §1151(a) boundaries do not automatically disappear just because a fee patent is issued. And, 18 USC §1151(a) reservation boundaries are not automatically established because dicta about agency lands is taken out of context and then retroactively parleyed into a 37,000 acre noncontiguous reservation (that promises to include another 6,000 acres, if not another 230,000 acres). In the process, the manner in which the analysis of the district court and the court of appeals avoids any reference that would focus on extinguished 1858 reservation boundaries is also especially noteworthy.

The last time the United States submitted a brief in this Court to address the decision of the court of appeals in *Gaffey*, App. I, 199, the United States maintained that the 230,000 acres of additional fee lands were wrongly excluded from the Yankton Reservation by the decision of the court of appeals. App. I, 199. If the United States is successful in fully reviving this issue at any time, the internal ***22** inconsistency in the decisions in this case and conflicts between the decisions in the court of appeals would certainly be resolved. *However, such a resolution would put thousands of non-Indians and thousands of acres of their fee property back within some reservation boundaries of the Yankton Reservation (a fact that the United States neglects to mention).*

5. Congress has a role in this reservation boundary process that the district court and the court of appeals have not respected. In 1941, even Felix Cohen made clear that Congress did not address reservation boundaries after the passage of the 1894 Yankton Act (which disestablished the 1858 reservation boundaries). *Yankton Sioux Tribe* at 355 n.5. If any allotments were within an 18 USC §1151(a) reservation boundary at any time after the Yankton Act of 1894, *Gaffey*, App. I, 199, was wrongly decided. That conflict persists.

For this reason, the County will rely on the critical, but disregarded, strong presumption of diminishment/disestablishment set forth in *Yankton Sioux Tribe* and confirmed by the South Dakota Supreme Court in *Bruguier*. The court of appeals' primary conclusion that each tract of noncontiguous trust land is encompassed within 18 USC §1151(a) reservation boundaries is not supported by evidence of congressional intent.

By ignoring the very strong presumption of diminishment/disestablishment, the court of appeals in *Gaffey* initially incorrectly designated a few hundred ***23** acres of noncontiguous agency land as an 18 USC §l151(a) reservation ("within the limits" of a " reservation"). On the remand, the district court then incorrectly concluded that all trust lands, including allotments that remained in trust, could also be designated an 18 USC §1151(a) reservation, effective as of the date of the district court decision. [FN5]

> FN5. The district court specifically recognized that the panel in *Gaffey* had previously held that allotted lands which had been transferred to non-Indian fee status before that date were not within the limits of Yankton Sioux Reservation. App. I, 250.

This result should have been rejected in the first instance on the basis of the very strong presumption of diminishment/disestablishment. Further, if the focus would have been on the presumption and extinguished 1858 reservation boundaries, the court of appeals would have demanded compelling evidence of congressional intent to overcome the presumption, to determine that allotments within extinguished reservation boundaries could somehow be transformed into 18 USC §1151(a) Indian reservations. No such evidence was presented. There is no precedent to support this position.

The United States and the Tribe initially argued that

Yankton Sioux Tribe did not hold that the 1858 Yankton Sioux Reservation boundaries were extinguished. They were successful in the district court, but the court of appeals ultimately decided the boundary question squarely in favor of extinguished ***24** 1858 boundaries. App. I, 199. After being reversed a second time on this point, the district court finally acquiesced.

Since that time, the district court and the court of appeals have not referenced extinguished reservation boundaries in their analysis. In the process of resurrecting, contrary to binding precedent, a 37,000 acre 18 USC §1151(a) noncontiguous reservation, the extinguished 1858 reservation boundaries are not mentioned in the district court's opinion. In the twenty-three page opinion of the court of appeals, they are only mentioned once, in one paragraph substantiating a historical point to justify the position of the United States on a different issue. This failure of the district court or the court of appeals to focus on extinguished 1858 reservation boundaries is difficult to explain or justify. *This is especially so in light of the fact that in over a century, no decision of the South Dakota Supreme Court or any other court, for that matter, has ever recognized a Yankton reservation with this configuration.*

6. The court of appeals and the parties are not free to slight the disestablishment presumption this Court established in *DeCoteau* and reiterated in *Yankton Sioux Tribe*. In oral argument in *Yankton Sioux Tribe*, this Court repeatedly stressed the controlling nature of this presumption. For example,
***25** Tribe: The cession and the sum certain language … it's just boilerplate …
Court: But this Court has said it's nearly irrebuttable.
Court: That's what *Solem* said.
Tribe: No … I say … the presumption is that the Indians retain the reservation and it's up to the State to rebut
Court: But then you - must … mustn't you, if you're taking that position, say, "Court, you were wrong; you should qualify or even overturn your precedent"? …
Court: if we're faced with something … almost irrebuttable … does … the part that's uncertain … dominate what we have said is a *very strong presumption?*

Transcript of Oral Argument, *Yankton Sioux Tribe,* 522 U.S. 329 (1998) (emphasis added), App. II, 841-842.

This Court in *Yankton Sioux Tribe* relied on the presumption and held that the 1858 reservation boundaries were *disestablished* in their entirety. *See also Yankton Sioux Tribe v. Southern Missouri,* 99 F. 3d 1439 (8th Cir. 1996) (J. Magill, dissenting).

The County submits that the presumption applies to the entire 1894 Act and area affected by the 1894 Act. And, moreover, this Court's direction applies to all subsequent proceedings in *Yankton Sioux Tribe*. The failure of the district court and the court of appeals to address or continue to respect this very ***26** strong presumption constitutes reversible error, worthy of the attention of this Court. Compare the repeated acknowledgment of the presumption in the opinion of the South Dakota Supreme Court in *Bruguier*.

In short, we respectfully submit that the court of appeals on remand took a sentence out of context and fashioned an 18 USC §1151(a) agency reservation of a few hundred noncontiguous acres of trust land with 18 USC §1151(a) reservation boundaries around each tract (without briefing) into a 37,000 acre reservation. This holding should be reviewed by this Court. (The United States maintained initially that the holding was "interlocutory" and the Tribe said it was " inconsistent" with all United States Supreme Court decisions.) This area, including the agency lands, is within the scope of the "very strong presumption" of diminishment/disestablishment reiterated in *Yankton Sioux Tribe*.

The Tribe and the United States did not support a 37,000 acre 18 USC §1151(a) noncontiguous reser-

vation with evidence of congressional intent or with any testimony from any of the witnesses. In fact, the Tribe and the United States never argued in support of this 37,000 acre 18 USC §1151(a) noncontiguous reservation, not once, not ever. In 15 years of litigation no one even suggested a reservation like this could exist. In this case, the district court and the court of appeals fashioned a permanent noncontiguous 18 USC §1151(a) reservation, with an 18 USC §1151(a) reservation boundary around each tract, and without precedent in the United States.

***27** In oral argument in *Yankton Sioux Tribe* in this Court, all sides made clear that the record essentially supported two choices - the 1858 reservation or no reservation. Neither choice squares with the novel 37,000 acre 18 USC §1151(a) noncontiguous reservation the district court and the court of appeals refashioned. And the record has not substantively changed.[FN6]

> FN6. Nothing of substance has been placed in evidence since the remand of this case with reference to congressional intent and the 1894 Act (just generic arguments and documentation related to testimony directed to individual land title records). Reference to anything substantive regarding congressional intent in the findings of fact and conclusions of law in the district court or in the court of appeals decisions to support noncontiguous reservation boundaries is truly a "virtual smokescreen." In addition, the County renews its reliance on the laches arguments in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005).

The first choice - the restoration of the original 1858 reservation boundaries - was unanimously rejected by this Court. The option of the second choice no reservation - was clearly left open. On remand, the lower courts were invited to make a decision, guided by the almost insurmountable presumption in *DeCoteau* that was reaffirmed in *Yankton Sioux Tribe*. They should have applied the presumption to the 1894 Act and the area it affected. The failure of the federal courts, since the time of the *Yankton Sioux Tribe* decision, to deal seriously with this Court's direction, laid the groundwork for the direct conflict with *Bruguier* that is now before this Court.

***28** B. The *Bruguier* decision of the South Dakota Supreme Court is clearly correct.

In state court, James Bruguier was convicted of burglary. His crime was committed within the original boundaries of the Yankton Reservation on allotted land to which Indian title had been extinguished. In a habeas corpus petition, Bruguier asserted that the Reservation remained intact and therefore the State lacked jurisdiction. The circuit judge concluded that the Reservation had been disestablished and denied the petition. *Id.*, App. I, 396, 407. The South Dakota Supreme Court, following this Court's lead in *DeCoteau, Yankton Sioux Tribe* and its own cases, affirmed, concluding that the 1894 Act disestablished and terminated the reservation. *Bruguier*, App. I, 164.

1. Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class,* June 30, 1998, App. I, 396-406.

The United States is mistaken in claiming that *Bruguier* did not definitively hold that the Yankton Reservation has been disestablished. When *Bruguier* presented in the circuit court, the circuit court framed the issue in that exact manner.

***29** a. Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, in *Bruguier v. Class,* June 30, 1998, App. I, 396-406.

Additional consideration of the *Yankton Sioux Tribe* decision convinced the circuit court that the 1894 Act terminated the Reservation. *Id.*, App. I, 402, 405. "[T]he reservation was terminated by the

1894 Act. The allotted lands are no longer a reservation under 18 USC §1151(a)." *Id.*, App. I, 405.

When 18 USC §1151(c) was addressed in the memorandum decision, the circuit court also cited additional state precedent with respect to allotments in areas, like the original Yankton area, where the original reservation boundaries were deemed to be extinguished. *Hollow Horn Bear v. Jameson,* 95 N.W. 2d 181 (S.D. 1959). *See also Beardslee v. United States,* 541 F. 2d 705 (8th Cir. 1976), discussed in the Petition of Southern Missouri. And the circuit court found that "an allotment to which Indian title has been extinguished; at the time the crime was committed … was no longer Indian country under 18 USC §1151(c)." App. I, 406.

***30** b. Findings of Fact and Conclusions of Law of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class,* August 14, 1998, App. I, 407-430.

The record and the findings of fact and conclusions of law in the circuit court are definitive.

Twenty-two pages of findings of fact and conclusions of law in the circuit court make clear that the foundation for the *Bruguier* opinion in the South Dakota Supreme Court was solid and detailed, crystal clear, and not simply based on abstract "reasoning" set forth in the opinion, as the United States claims.

One Finding confirms that even the United States previously acknowledged reservation disestablishment.

[*N*]*o reservation existed in the area* under 18 USC §1151(a) and that the only "Indian country" remaining was trust allotments, the Indian title to which had not been extinguished, pursuant to 18 USC §1151(c).

Bruguier Finding #23G, App. I, 417 (emphasis added).

The circuit court noted the "absurd" jurisdictional result which would occur if the theory of the habeas petitioner was adopted. Finding #30, App. I, 419-420.

***31** 2. *Bruguier v. Class,* 599 N.W. 2d 364 (S.D. 1999), App. I, 164-198.

On appeal, in *Bruguier*, App. I, 164-198, the South Dakota Supreme Court was in a solid position to decide the status of the Yankton Sioux Reservation because of the record in the circuit court. Moreover, the South Dakota Supreme Court was very much aware of its role in this litigation.

"Interpretation of federal law is the proprietary concern of state, as well as federal, courts." *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 275 … Indeed, the jurisdictional issue here is as *vital* to South Dakota as it is to the Yankton Sioux Tribe and the Federal Government; thus, it is proper for this Court to determine where state jurisdiction lies. [9] [9] For this reason, we have received and reviewed all the briefs and exhibits submitted to the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Gaffey.*

Id., App. I, 174 (emphasis added).

From the beginning, the South Dakota Supreme Court understood what exactly was at stake in the *Bruguier* litigation. With the benefit of the decision in *Yankton Sioux Tribe*, the South Dakota Supreme Court clearly understood the issue. *Id.*, App. I, 177-180. In addition to the record in *Yankton Sioux Tribe*, which had been incorporated by the parties in the same state cases noted in the circuit court in *Bruguier*, the South Dakota Supreme Court also referenced the Joint Appendix briefs from *Gaffey. Id.*, App. I, 166.

***32** With this understanding, the South Dakota Supreme Court strictly adhered to the general principles set forth in the *Yankton Sioux Tribe* opinion. In the first instance, the South Dakota Supreme Court explicitly recognized the importance of *DeCoteau* in the *Yankton Sioux Tribe* opinion. *Id.*, App. I, 181, 195-196. The presumption of disestab-

lishment tied to the language of the Yankton Act is detailed at App. I, 181. The Court found the absence of any provision for tribal ownership significant. *Id.*, App. I, 185.

The South Dakota Supreme Court also recognized the importance of the General Allotment Act in the process. The South Dakota Supreme Court further noted that, after the cession, "tribal title" did not involve allotments. *Id.*, App. I, 183. The United States and tribal advocates ordinarily reference later tribal advocacy editions of this Cohen text for support, but at this stage in the *Yankton Sioux Tribe* proceedings, such references are remarkably absent. Federal Indian Law texts undermine the position of the United States and the Yankton Sioux Tribe in this case, as well as the remand opinions of the federal district court and the court of appeals.

The South Dakota Supreme Court also discussed the history of the 1894 Act and every significant argument that had been advanced in opposition to reservation disestablishment since *Yankton Sioux Tribe*. The Court held the reservation was disestablished and that holding squarely conflicts with the holding of the court of appeals.

***33** Had the comprehensive opinion in *Bruguier*, documenting reservation disestablishment, been decided at the time this Court decided *Yankton Sioux Tribe*, the twelve years of remand litigation by the United States and the Yankton Sioux Tribe since that time, one time waiting for years for a hearing even to be scheduled, would have been unnecessary and could not have been maintained.

II. The Decision Of The Court Of Appeals Also Conflicts With Decisions Of This Court And Established Federal Indian Law.

A. The court of appeals decision conflicts with *DeCoteau v. District County Court,* 420 U.S. 425 (1975), other precedent of this Court and other courts.

DeCoteau explains how 18 USC §1151 has traditionally been construed. *DeCoteau v. District County Court,* 420 U.S. 425, 427 n.2 (emphasis added). *DeCoteau* also explains that when an act of Congress has extinguished the reservation boundaries surrounding an area of ceded lands, allotments are not within the limits of a continuing reservation. That, of course, is precisely the situation here, because this Court and the court of appeals have both held that the 1858 Yankton Reservation boundaries have been eliminated. In this situation, allotments continue to be Indian country under 18 USC §1151 (c) only if the Indian title has *not* been extinguished (i.e., still in trust, not in fee). This is the holding of *DeCoteau* in no uncertain terms.

***34** In such a situation, exclusive tribal and federal jurisdiction is limited to the *retained* allotments. 18 USC §1151(c). See *United States v. Pelican,* 232 U.S. 442.

DeCoteau v. District County Court, 420 U.S. 425, 446-447.[FN7]

> FN7. The court of appeals cites *Pelican* and 18 USC §1151(c) at App. I, 26, but attempts to distinguish fact situations. *Pelican* cannot be distinguished. *Pelican* involved an allotment held in trust where the Act extinguished reservation boundaries surrounding the area. The area not affected was the diminished Coville Reservation recognized in *Seymour v. Superintendent,* 368 U.S. 351 (1962). *Pelican* was codified as "authority" to include Indian trust allotments in 18 USC §1151(c). The decision of the court of appeals conflicts with all of this.

In other words, the allotments here are not within the limits of an 18 USC §1151(a) Indian reservation.

In the original Rosebud Reservation, (right across the Missouri River from the Yankton area), where Acts of Congress in the next decade similarly extinguished reservation boundaries, this Court emphasized the point:

To the extent that members of the Rosebud Tribe are living on allotted land outside of the Reservation, they, too, are on 'Indian country,' within the definition of 18 USC §1151 [more specifically 18 USC §1151(c)], and hence subject to federal provisions and protections.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 n.47 (1977).

***35** The fact that some 18 USC §l151(a) reservations continued to exist in other areas of the Rosebud Reservation was not probative of continuing reservation status for allotted lands within the extinguished area; indeed, the point of *Pelican* and *Rosebud* is that such lands are not reservation. Allotted lands within an extinguished area are classified as "allotted lands, the Indian titles to which have not been extinguished" under 18 USC §1151(c), under *Pelican* (which prompted 18 USC §1151(c)), and *Rosebud*, which implements *Pelican* and §1151(c). (*See also Beardslee v. United States,* 387 F. 2d 280 (8th Cir. 1967) and *Cook v. Parkinson,* 525 F. 2d 120 (8th Cir. 1975).)

In other words, *Pelican,* 232 U.S. at 449 (as *DeCoteau* and *Rosebud* confirm), establishes that when reservation boundaries around an area are extinguished, the allotted lands remain "Indian country," but only "during the trust period." The decision of the court of appeals thus undermines the long-established meaning and interpretation of 18 USC §1151(c). *Beardslee v. United States,* 387 F. 2d 280, 284, 287 (8th Cir. 1967) (Blackmun, J.) (Rosebud allotted lands within extinguished boundaries retain "Indian country" status, but such status is " temporary and lasts only until the Indian title is extinguished.")

III. The Shifting Arguments Of The United States Are Without Merit.

A fair reading of *Seymour v. Superintendent,* 368 U.S. 351 (1962), *Mattz v. Arnett,* 412 U.S. 481 (1973), ***36** *DeCoteau v. District County Court,* 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), *Solem v. Bartlett,* 465 U.S. 463 (1984), *Hagen v. Utah,* 510 U.S. 399 (1994) and *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998), undermines the continuing reservation status of any Yankton Reservation recognized by the court of appeals. The same cases confirm that the South Dakota Supreme Court in *Bruguier* was clearly correct in holding that the Yankton Reservation was disestablished.

In *Yankton Sioux Tribe*, the County reviewed the main arguments presented and rejected in each reservation boundary case decided by this Court, as well as the historic perspective at that time. Br. of Charles Mix County, South Dakota in Supp. of Pet'r, *Yankton Sioux Tribe,* 522 U.S. 329 (1998) (No. 961581), App. II, 460. To complete the perspective, the County also reproduced every brief and oral argument that the United States has submitted in these cases. App. II, 504-830.

The arguments of the United States are especially noteworthy. The United States, as *amicus curiae*, submitted an earlier Brief in this case acknowledging a "strong interest in protecting the integrity of reservation boundaries." Br. for the United States, App. II, 722. What the United States has never acknowledged is the repeated rejection of those arguments by this Court and the manner in which concessions and conflicts are simply ignored by the United States. ***37** This has always been a problem, with the United States in reservation status cases. But it is especially troublesome, when, as in this case, the concession and conflicts are in the *same* case. *See New Hampshire v. Maine,* 532 U.S. 742 (2001).

The United States has never failed to advocate the resurrection of reservation boundaries, presumably because of this perceived obligation to always support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate the confusion and conflict in this area of federal Indian law, fueling prospects of additional litigation. This case is a perfect

example.

In 1975 in *DeCoteau,* 420 U.S. 425 (1975), the United States argued against cession disestablishment because of the General Allotment Act and lost. App. II, 537, 769. After the decision of this Court in *DeCoteau*, even the United States repeatedly acknowledged that Congress intended cession statutes such as the Yankton cession to disestablish reservation areas. In *Hagen*, the United States acknowledged that it would be "rather difficult" to support any other construction. App. II, 799.

Moreover, the specific cession concessions of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation are significant. For example, in 1984, the United States formally submitted this Yankton reservation disestablishment ***38** concession in the Eighth Circuit Court of Appeals. *United States v. Dion,* 752 F. 2d 1261 (8th Cir. 1985) *rev'd in part by, United States v. Dion,* 476 U.S. 734 (1986).

In other litigation pending at the same time, also dealing with the 1858 Yankton Sioux Reservation, the United States acknowledged that this Court's decision in *DeCoteau* involved "a similar and contemporaneous cession agreement" with "the same language" and "purpose." Br. for the United States, *Yankton Sioux Tribe v. South Dakota,* 796 F. 2d 241 (8th Cir. 1986), *cert. denied,* 483 U.S. 1005 (1986). But in *Yankton Sioux Tribe*, the United States attempted to circumvent the holding in *DeCoteau* regarding this type of cession. In the process, the United States and the court of appeals fashioned a reservation in direct conflict with the holding in *Bruguier*.

Past experience suggests that the United States will support whatever argument the Yankton Sioux Tribe chooses to advance in this Court. One other thing is fairly certain. The United States will not honor the position advanced by the Office of the Solicitor General in this Court in *Yankton Sioux Tribe* (i.e. that disestablishment was inevitable if the argument of the United States regarding Article XVIII was rejected and the 1858 Yankton boundaries were not recognized by this Court, because *nothing* in the Yankton documentation supported any other conclusion). Briefs for the United States, App. I, 722, 808. App. I, 808-859. This Court in *Yankton Sioux* ***39** *Tribe* rejected the argument of the United States and the 1858 reservation boundaries were not recognized.

This Court found that:
Moreover, the Government's contention … contradicts the common understanding of the time. … Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion." …

Yankton Sioux Tribe, App. I, 345-346.

Nevertheless, within days of the *Yankton Sioux Tribe* decision, the United States reneged on the inevitable disestablishment argument it presented to this Court, even before the case was remanded to the district court. Since then, the United States has adopted several conflicting arguments to continue supporting the position of the Yankton Sioux Tribe that the 1858 reservation boundaries be resurrected or, at least some type of reservation be recognized.

The "litigating position" of the United States in this type of case should be subject to heightened scrutiny. *South Dakota v. Bourland,* 508 U.S. 679, 697 (1993). *See also Washington v. Yakima Indian Nation,* 439 U.S. 463, 477-478 n.20 (1979) ("[United States] recently changed its position diametrically"). The rejection of the position of the United States by this Court in *Yankton Sioux Tribe* counsels there is ***40** no basis to give any special credence to the position of the United States in cases of this nature.

CONCLUSION

Petitioner Charles Mix County respectfully requests the Court to grant its Petition.

Hein v. Yankton Sioux Tribe
2011 WL 190422 (U.S.) (Appellate Petition, Motion and Filing)

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